U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: October 29, 1997

Case No.: 96-INA-00052

In the Matter of:

BLESSED SACRAMENT SCHOOL,
Employer

On Behalf Of:

ENRICO MARIN DOMINGO,
Alien

Appearance: Manuel B. Quintal, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 8, 1993, Blessed Sacrament School ("Employer") filed an application for labor certification to enable Enrico Marin Domingo ("Alien") to fill the position of Elementary School Teacher (AF 15). The job duties for the position are:

> Teach elementary school pupils academic and social skills; assign lessons, correct papers and hear oral presentations; counsel pupils when adjustment and academic problems arise; discuss pupils' academic behavior problems with parents and suggest remedial action; and keep attendance and grade records as required by school authorities.

The requirements for the position are a Bachelor of Arts Degree in any field of study, and one year of experience in the job offered. Under Other Special Requirements the Employer listed at least six months of experience teaching multi-racial classes.

The CO issued a Notice of Findings on June 16, 1995 (AF 209), proposing to deny certification on the grounds that the Employer's requirement of six months of experience teaching multi-racial classes is unduly restrictive in violation of 20 C.F.R. §§ 656.21(b)(2) and 656.24(b)(2)(ii). The CO also found that the Employer had unlawfully rejected U.S. applicants Solrina Carrasquillo, Denise Cracchio, Helen LoBrutto, Nicolette Ferrante, and Herman Grim, who met the minimum requirements for the position, in violation of §§ 656.21(b)(6) and § 656.20(c)(8). The CO also found that the Employer had failed to make good-faith efforts to contact four of the above applicants. The Employer was given notice that it must provide documentation to establish the business necessity of the teaching a multi-racial class requirement or delete the requirement and readvertise.

In its rebuttal, dated July 19, 1995 (AF 214), the Employer, through Counsel, contended that its requirements are not unduly restrictive, and it applied good-faith efforts in recruiting U.S. applicants. In support of its recruitment efforts, the Employer simply stated that it was their belief that telephone calls to applicants are sufficient to constitute good faith recruitment.

The CO issued the Final Determination on July 28, 1995 (AF 216), denying certification because the Employer failed to adequately document good-faith recruitment efforts for five U.S. applicants in violation of 20 C.F.R. §§ 656.24(b)(2)(ii), § 656.21(b)(6), and § 656.20(c)(8).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On August 24, 1995, the Employer requested review of the denial of labor certification (AF 226). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of obtaining proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is explicit. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In this case, the CO finds that the Employer failed to adequately document a good-faith effort to recruit five U.S. applicants (AF 207-08). The Employer contends that it made reasonable, good-faith efforts to contact U.S. applicants Solrina Carrasquillo, Denise Cracchio, Helen LoBrutto, and Nicolette Ferrante when it left telephone messages for them, but they did not return the call and were assumed not to be interested in interviewing (AF 211).

It is well settled that reasonable efforts to contact qualified U.S. applicants may require more than one type of contact. *Diana Mock*, 88-INA-225 (Apr. 9, 1990). An employer who does nothing more than make unanswered phone calls or leave messages on an answering machine has not made a reasonable effort to contact a U.S. worker where the address is available. *K-J Machine Co.*, 93-INA-71 (Apr. 12, 1994); *Any Phototype, Inc.*, 90-INA-63 (May 22, 1991). Where the addresses of U.S. applicants are available, then an employer fails to establish good-faith efforts to recruit where it only attempted phone contact several times but did not mail any interview letters. *Saturn Plumbing*, 92-INA-194 (Feb. 3, 1994); *Gutierrez Gardening*, 92-INA-372 (Dec. 15, 1993). Labor certification is properly denied where the responses of qualified applicants contradict the employer's version as to its attempts to contact and arrange interviews, where the employer was unable to document its good-faith efforts to recruit through certified mail receipts or other evidence. *Get Set Kindergarten and Elementary School*, 93-INA-284 (July 8, 1994); *World Tae Kwon Do University*, 93-INA-308 (July 26, 1994). The record shows that the addresses of the applicants were available, but the Employer did not attempt any contact other than unanswered phone messages. Based on the foregoing, we find that the Employer has failed to adequately document its good-faith efforts to recruit four qualified U.S. applicants, in violation of § 656.20(c)(8).

Regarding applicant Grim, the Employer did not attempt to interview him, rejecting him because of "inadequate teaching experience" (AF 193). Mr. Grim's resume shows teaching experience in 1991 and 1992, and experience as a substitute teacher in the New York City Public Schools during the 1991-1993 time period (AF 134). In rebuttal, the Employer responded that he was rejected because he had no experience teaching multi-racial classes listed on his resume (AF 211). Where the applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the requirements, an employer bears the burden of further investigating the applicant's credentials. *Gorchev and Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). In this case, Mr. Grim's resume indicates two years of experience substitute teaching in the New York City Public Schools, which raises a reasonable possibility that he has some experience teaching multi-racial or multi-cultural classes of students. We find that the Employer has failed to carry its burden of further investigating Mr. Grim's credentials, and accordingly, failed to recruit him in good faith in violation of § 656.20(c)(8).

Based on the foregoing, we find that the Employer has failed to adequately document that it recruited five U.S. applicants in good faith. The CO's denial of labor certification on this issue was therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.